

APPEAL NO. 032133  
FILED OCTOBER 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 7, 2003. The hearing officer determined that the appellant/cross-respondent (claimant herein) was in a state of intoxication due to the voluntary introduction of a controlled substance at the time of his injury and thus the respondent/cross-appellant (carrier herein) was relieved of liability for the injury. The claimant appeals this decision as being contrary to the evidence and argues that the hearing officer's decision is inconsistent with the hearing officer's finding that she found the claimant credible. The carrier responds that the evidence supports the hearing officer's finding of intoxication and that she applied the correct legal standards in making this finding. The carrier also files a request for review in which it contends that the hearing officer's finding that, as a result of his injury, the claimant was unable to obtain and retain employment from January 4, 2003, and continuing through the date of the CCH was not supported by the evidence, and that she erred in determining the claimant had disability. There is no response from the claimant to the carrier's request for review in the appeal file.

DECISION

Affirmed in part; reversed and rendered in part.

It is undisputed that on \_\_\_\_\_, the claimant suffered a partial amputation of the fifth finger of his right hand when it was caught in a machine at work. The hearing officer found that the claimant was intoxicated from a controlled substance at the time of this injury. The carrier's evidence of intoxication included drug testing performed on the claimant after his injury as well as evidence from toxicologists. The claimant contends that he did not use a controlled substance and attributes the positive drug testing to the fact that he was administered opiates at the hospital emergency room prior to the drug testing. The carrier presented testimony from Dr. W, a toxicologist, that the drug testing established the presence of heroin in the claimant's system at levels that would have impaired the claimant at the time of the injury. The claimant argues that, at the time of the injury, he had been working for hours and that he had the normal use of his mental and physical faculties at the time of the injury.

Section 406.032(1)(A) provides that an insurance carrier is not liable for compensation if the injury occurred while the employee was in a state of intoxication. The definition of intoxication applicable to this case is the state of not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of a controlled substance. Section 401.013(a)(2). As explained in Texas Workers' Compensation Commission Appeal No. 021751, decided August 26, 2002, an employee is presumed sober; however, when the carrier rebuts the presumption of sobriety with probative evidence of intoxication, the employee has the burden of proving that he was not intoxicated at the time of the injury.

A urine specimen was collected from the claimant approximately three hours after his accident at work, and it is undisputed that the claimant's positive drug screen with confirmatory testing for heroin metabolite shifted the burden of proof to the claimant. Conflicting evidence was presented on the intoxication issue. The hearing officer found that at the time of the injury, the claimant did not have the normal use of his mental and physical faculties. It is clear from the hearing officer's decision that the claimant's state of not having the normal use of his mental or physical faculties at the time of his injury was based upon the voluntary introduction of a controlled substance into his body. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision on the intoxication issue is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We do not believe that the hearing officer's finding that the claimant's testimony was credible is necessarily in conflict with her resolution of the intoxication issue. While the claimant denied drug use and testified that he had the normal use of his mental and physical faculties, the hearing officer obviously found the medical records and the testimony of Dr. W more persuasive on these issues. Merely stating that the claimant's testimony was credible is not tantamount to finding it is controlling when there is conflicting evidence. Thus, we affirm the hearing officer's resolution of the intoxication issue.

As far as the carrier's appeal is concerned, we find, in light of our standard of review discussed above, that there was sufficient evidence to support her factual finding that as a result of the injury sustained on \_\_\_\_\_, the claimant was unable to obtain and retain employment at wages equivalent to the preinjury wage from January 4, 2003, continuing through the date of the CCH. Since the hearing officer determined the intoxication issue against the claimant, the claimant did not have a compensable injury as defined by Section 401.011(10), and since Section 401.011(16) requires the existence of a compensable injury as a prerequisite to a finding of disability, the hearing officer erred in concluding that the claimant had disability. We, therefore, reverse her legal conclusion that the claimant had disability from January 4, 2003, continuing through the date of the CCH and render a decision that the claimant did not have disability.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, SUITE 750, COMMODORE 1  
AUSTIN, TEXAS 78701.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Chris Cowan  
Appeals Judge